

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2009-053747

08/27/2010

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT

C. Kelly

Deputy

IN RE THE MARRIAGE OF
JIMMY R LOPEZ

GENE R STRATFORD

AND

LAURA E BATTAGLIA

CHRISTOPHER RIKE

CONCILIATION SERVICES-NE
FAMILY COURT SERVICES-CCC

MINUTE ENTRY

Due to clerical error,

IT IS ORDERED amending the Ruling minute entry dated August 25, 2010. The minute entry shall read as follows:

I. INTRODUCTION

Pending before the Court is Father's Petition to Establish Custody, Parenting Time and Child Support. Paternity has been established and the minor child at issue is Sawyer Lopez.¹ (DOB 8-20-09) ("Sawyer" or "Minor Child"). He just turned a year, on August 20, 2010. The Court held an evidentiary hearing and took the custody and parenting time issues under advisement. The Court now makes its under advisement ruling.

¹ The Petition, filed by Father, alleges his name to be "Sawyer Lopez." Accordingly, the Court for purposes of this minute entry will use that name. Mother, however, has changed his surname twice since the parties separated in October 2009. The Court addresses the issue *infra*.

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II. CUSTODY

A. Factual Findings:

When considering the issue of custody, the Court is guided by A.R.S. §25-403A, § 25-403.01 (legal custody), § 25-403.03 (domestic violence issues) and § 25-403.04 (drug offenses).

The Court may award either sole or joint custody after considering the factors set out in A.R.S. § 25-403A, Ariz. Rev. Stat. Ann. § 25-403.01 and any other relevant factors.

The Court now turns to A.R.S. §25-403A (1)-(11).

A.R.S. §25-403(A) (1) the wishes of the child's parent or parents as to custody.

Father wishes to have sole legal custody of the child and further asks the Court to continue the 50/50 parenting time. Mother too wants sole custody of Sawyer. She asks to be the primary physical custodian and offers father every-other weekend with Sawyer and mid-week visitations.

THE COURT FURTHER FINDS:

That both parties have adequately framed their positions and will proceed thorough the remaining factors.

A.R.S. §25-403 (2) the wishes of the child as to whom the custodian should be.

THE COURT FURTHER FINDS:

The child is too young to express meaningful wishes as to whom the custodian should be.

A.R.S. §25-403 (3) the interaction and the interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interests.

THE COURT FURTHER FINDS:

The child does well with both parents. There is no one in either residence that the Court finds adversely affects the child's best interests.

A.R.S. §25-403 (4) the child's adjustment to home, school and community.

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THE COURT FURTHER FINDS:

Sawyer is far too young for school and he has adjusted well to both parents' homes.

A.R.S. §25-403 (5) the mental and physical health of all individuals involved.

Both parties detailed the combative nature of their relationship, especially toward its ending in October 2009. Certainly, both parties were disrespectful and angry with one another during this time period. Both parties presented evidence asking the Court to find that the other's conduct crossed the line. Toward that end, the Court considers the evidence for two reasons, that is, whether the conduct has a nexus with mental health issues that need to be addressed and/or whether the conduct constitutes an act of domestic violence.²

The Court finds that evidence supports a conclusion that Mother has an anger-management problem that must be addressed to protect the child's best interest. Father's testimony and evidence on the issue is far more credible than Mother's. Mother has an anger-management issue that will be addressed substantively *infra*. For purposes of the Court's factual findings, the Court has determined that her anger was reflected during one exchange when she "flipped off" Father's family. It was also demonstrated by her tome of correspondence with Father wherein she used very abusive and inappropriate language. One final example of her of her demonstrable anger (and her willingness to act out on it) was her unilateral decision to change Sawyer's name. (The Court wholly rejects Mother's claim that the parties agreed that the name chosen at the hospital was the result of Father's coercion (anger outburst in the birth room) or that Father ever agreed that she could change the name if the parties did not marry).

THE COURT FURTHER FINDS:

² Mother also presented evidence that Father, as wrestling coach, inappropriately supervised his high school students. According to Mother's evidence, Father inappropriately permitted the student wrestlers to "pink belly" and lied to school investigators when complaints were made. She further presented the testimony from a former assistant coach who told the Court that Father stated he would "lie" to investigators if asked about inappropriate student-wrestler conduct that the assistant coach raised with Father. (He also testified that he had contacted the District who advised that Father was going to continue the after-school wrestling coach-position). The evidence of Father's veracity was considered by the Court in its evaluation of all of Father's factual assertions. However, there is no meaningful nexus between the substantive conduct raised, e.g., "pink-bellying" and parenting-fitness issues.

The Court also considered the evidence from Mother's friend who described the events of the October breakup and was a character witness. The Court finds her testimony to lack very much credibility, largely due to a statement she made in response to a question asked by Father's counsel. Specifically, she was asked whether she was aware of the abusive correspondence initiated by Mother and she offered an inappropriate response—that is, suggesting that Mother's off-color comment about Father had substantive merit.

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The Court finds that both parents are mentally and physically fit and capable of parenting. Both parents have admitted that they have engaged in mutual arguments, but, in the Court's view, Mother's anger raises issues that need be addressed. It does not amount to domestic violence as set forth under Ariz. Rev. Stat. Ann. § 25-403.03.

A.R.S. §25-403 (6) which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent. This provision does not apply if a child is withheld to protect him or her from witnessing an act of domestic violence or being abused.

Mother cut off Father's ability to see Sawyer for almost two months. The Court finds Father's testimony and evidence to that effect to be credible. She also repeatedly lied to him about her and Sawyer's location and she threatened Father with the loss of his job. She further demonstrated a willingness to alienate Sawyer from Father when she changed his name twice, without permission. These acts were borne out of anger but also demonstrated her willingness to deny Father his parenting time. The Court addresses the anger issue *infra*.

The Court acknowledges that Mother offered Father shared Christmas parenting time in December 2009 with Mother and maternal grandmother. Notwithstanding the fact that December 2009 was Sawyer's first Christmas, Father rejected the offer. Mother testified that she made the offer because the plane ticket had been paid and maternal grandmother remained willing to allow him the visit despite his putative misconduct. The Court finds that the offer was designed to manipulate Father to spending time with *Mother*, not with Sawyer. Indeed, the offer was nothing more than Mother's attempt to use the child as means to facilitate the parties' reconciliation

THE COURT FINDS:

With appropriate boundaries and an appropriate division of the parties' rights, defined by Court Order, the Court finds that both parties are equally amenable to providing the other parents with meaningful contact with the other parent.

A.R.S. §25-403 (7) whether one parent, both parents, or neither parent has provided primary care of the child.

Mother has been the primary caretaker of Sawyer.

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THE COURT FURTHER FINDS:

Father's substantial care-taking role, especially since the parties' separation, should not be overlooked.

A.R.S. §25-403 (8) the nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.

THE COURT FINDS:

While Mother's conduct came close to the line, neither party has exercised coercion or duress as envisioned by Ariz. Rev. Stat. Ann. § 25-403(8).

A.R.S. §25-403 (9) whether a parent has complied with chapter 3, article 5 of this title.

THE COURT FINDS:

Both parties have taken the required parenting classes.

A.R.S. §25-403 (10) whether either parent was convicted of an act of false reporting of child abuse or neglect under §13-2907.02.

THE COURT FINDS:

Neither parent has been convicted of an act of false reporting of child abuse or neglect under §13-2907.02.

A.R.S. §25-403(11) whether the parties have engaged in act of domestic violence.

THE COURT FINDS:

Neither party has engaged in domestic violence.

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THE COURT FURTHER FINDS:

That neither parent has been convicted of a drug offense in the last one year.

B. Conclusions of Law.

Based upon the forgoing,

THE COURT FINDS that it is in the minor child's best interests is to impose an order of joint physical custody and order that both parents have joint legal custody.

Both parents have persuasively demonstrated that they have been unable to communicate effectively about Sawyer's best interest. They both place the blame on one another. Father, however, has demonstrated by clear and convincing evidence that it has been Mother's conduct that has a direct and causal connection to their inability to communicate. He proved clearly and convincingly that: (i) Mother sent him very abusive and inappropriate messages spanning a time period that led up to Temporary Orders hearing in February 2010³; (ii) Mother was very distraught about the parties' break-up well beyond October 2009; (iii) Mother changed Sawyer's name with the Department of Vital Statistics, twice, without Father's permission- tacit or otherwise; and (iv) Mother, on at least one occasion, was abusive at an exchange of Sawyer("flipping off" Father's family members).

The Court acknowledges that Mother provided evidence suggesting that she has, for the large part, acted appropriately. The Court finds that the great weight of the evidence is that her position is factually unsupported by the evidence or that it simply lacks credibility. Still, it is important to note that her view points include: (i) Father's behavior at the time of the breakup was abusive and controlling. (ii) Sawyer suffers from separation anxiety and she believes he needs her as the primary physical caretaker evidence Sawyer "crying"; (iv) evidence that she believed that when Sawyer was evaluated the evaluator told her he focused inordinately on her; Father has not provided appropriate medical attention, from time to time, offering the testimony of Sawyer's pediatrician, Dr. Webb; (5) Mother is "over" her undeniable anger and has "move on."⁴

³ Mother testified that the correspondence that Father provided to the Court was "incomplete" and the correspondences were, for the most part, a response to equally unpleasant correspondences from Father. She also unequivocally denied making some of the correspondences, without explaining how they might have been generated from her phone. The Court has taken into consideration her factual positions on these issues well.

⁴ Mother also argues that Father's testimony about his intent to quit the coach for wrestling is fabricated. The testimony on that point was entirely unpersuasive.

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When examining the totality of the circumstances, the Court has also considered the Parenting Coordinator's (PC) Report and testimony. The Report is not a custody evaluation. Dr. Lavit was, in the Court's view, very careful to draw the line. He nonetheless testified that there was empirical data that suggests that a primary residential caretaker was ordinarily in a child's best interest when Sawyer's age. He reports that person is ordinarily the mother.⁵

While a primary residential care provider may be the "optimal" goal for Sawyer, that optimal goal cannot be met consistent with Sawyer's best interests. The Court finds that Mother has a sense of "entitlement" due to her maternal status. That belief has, in part, precipitated her visceral anger with Father when Father broke up and had the temerity to ask to co-parent Sawyer on an equal footing with her. The "separation anxiety" that she believes that Sawyer suffers from is, in the Court's view, largely her own anxiety. Indeed, Father presented evidence that Sawyer is happy and well-adjusted when in his care. Mother's testimony about an evaluation is self-serving and inconclusive.

Ultimately, the Court finds Mother's sense of entitlement combined with her pervasive anger issues makes a joint physical custodial arrangement far more sensible. After evaluating all the factors under Ariz. Rev. Stat. Ann. §25-403, the Court concludes that Sawyer's adjustment to both parents' homes serves him well and should be fostered. This factor is the linchpin of the Court's decision. The Court's decision is made easier *because both parents* provide loving/nurturing homes for Sawyer and both have families that interact well with him. If the Court ordered Mother to be the primary care residential custodian, as she asks, the Court finds it likely that she will abuse that role and deprive Father of his parenting time. As noted above, prior to the litigation, Mother lied about her/Sawyer's location, threatened Father with losing his job, and later changed Sawyer's name. Even when exercising the 50/50 custody after temporary orders were issued, Mother withheld Sawyer from Father feigning that he was too ill for visitation, a claim belied by the medical evidence. Finally, insight into how Mother feels regarding her entitlement was revealed during the heated exchange just prior to her "flipping" the finger. During that exchange she was angry and hostile which ended with her hand gesture. Notably, during the exchange she justified her anger telling those present that she was being deprived of her child in spite of a 50/50 parenting plan.

IT IS ORDERED adopting the 2-3-3-2 plan set forth in the Court's Order dated 2/11/10, on pp. 2-3. The Court has considered Father's request to alter the exchange times but the Court

⁵ The Court finds that Father's putative failure to cooperate with the PC was merely a scheduling issue and does *not* reflect his unwillingness to engage the PC or act in Sawyer's best interest. With respect to the idea that a Mother is the preferred person to be the caretaker, the Court takes into account those relevant factors under Title 25, section 403A, which does not include gender. The Court has, as required, taken into account the primary care taker which in this case, as in many involving young children, is Mother.

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declines. Accordingly, the “regular parenting time” shall be as originally set forth in the Temporary Order.

The parties shall mutually exchange the child at an agreed-upon location. Until/if the Order of Protection (OOP) is modified or expires, the parties shall abide by its terms and the party dropping off the child at the exchange location must use an agreed-upon third party to make the exchange. If the OOP is modified or expires, the parties may then personally participate in the exchanges.

IT IS FURTHER ORDERED that, pursuant to Ariz. Rev. Stat. Ann. § 403.01, the parties shall share joint legal custody of Sawyer. The Court finds it to be logistically possible for the parties to communicate about Sawyer’s reasonable needs. The Court also finds that the parties’ failure to communicate arises from matters that can be resolved with well-defined orders addressing their communication, the parties’ counseling and the on-going use of the PC. Thus, if the Court orders, as it does below, that the parties communicate about Sawyer only and impose orders addressing effective means of exchanging information, the parties can exercise joint legal custody.

This Order requiring joint legal custody is in Sawyer’s best interest. Both parents have much to contribute by way of decision-making. Mother is a health-care professional and Father has worked with children, albeit older children, for years. The Court will not deny Sawyer the benefit of both of their wisdom. Mother’s hostility will, with help, be both transitional and temporary.

C. Other Parenting Orders

IT IS ORDERED that the parties shall share “Major Holidays” as set forth herein as follows, divided by “years that end in Odd” numbers and “Even” numbers:

Major Holiday	Mother	Father
Thanksgiving	Even	Odd
Christmas	Odd	Even
Easter	Even	Odd
Mother’s Birthday	Every	Never
Mother’s Day	Every	Never
Father’s Birthday	Never	Every
Father’s Day	Never	Every
July 4th	Odd	Even
Halloween	Even	Odd

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Thanksgiving shall be defined as the Wednesday before Thanksgiving at 6:00 p.m. until the Sunday following at 6:00 p.m.

Christmas shall be defined as starting from December 23rd at 6:00 p.m. to December 28th at 6:00 p.m.

Easter shall be defined as Easter Sunday starting from 8:00 a.m. until 6:00 p.m.

Mother's Birthday shall be defined as her birthday starting from 8:00 a.m. until 6:00 p.m.

Mother's Day shall be defined as that Sunday starting from 8:00 until 6:00 p.m.

Father's Birthday shall be defined as his birthday starting from 8:00 a.m. until 6:00 p.m.

Father's Day shall be defined as shall be defined as that Sunday starting from 8:00 until 6:00 p.m.

July 4th shall be defined as July 4th starting from 4:00 p.m. until 10 p.m.

Halloween shall be defined as October 31st starting from 4:00 p.m. until 8:00 p.m.

Major Holidays shall supersede Regular Parenting Time.

IT IS ORDERED that:

1. Both parents shall immediately advise the other parent of any emergent circumstance that touches on Sawyer's education and physical, mental, moral or emotional health.
2. The parties are encouraged to communicate by phone if possible, or by email and/or facsimile if they choose. The parties shall employ the follow guidelines: (1) 1 topic per e-mail, facsimile or phone call; (2) the written communications shall be one short paragraph, no more than 5 sentences; (3) all communications should be either (i) future-focused regarding an emerging problem, or (ii) informative such as providing information about Sawyer's physical, emotional or moral welfare; (3) all communications must pertain to Sawyer's physical, emotional or moral welfare; (4) communications may not be repetitive unless the communication party has reason to believe a previous communication was overlooked; (5) parties shall respond in a timely fashion, within 24 hours of a communication and when an "emergency" exists the sending party shall signal

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the receiving party notice by captioning the e-mail "911." (6) Absent good cause, the parties should initiate no more than 2 communications per day; (7) the communications about Sawyer, absent good cause, shall be between the parties and not involve other caregivers; (8) each parent and caregivers shall exchange their contact information so that at they may communicate when circumstances addressing the Sawyer's physical, emotional or moral welfare are at issue; (9) in no event, shall the parties use sarcastic, profane or abusive language.

3. The parties shall maintain spiral binders, labeled on the front cover, by Month and Year ("Binder"). The Binder shall be exchanged with Sawyer. While caring for Sawyer, each party shall note all events that affect his moral, emotional or physical well-being, along with the time and other directly relevant information and place their initials after the entry. For example, only: "August 17, 2010, 1:00 p.m., Sawyer had cough, gave him cougher syrup, one tsp of Triaminacol." J.L." In no event, in no event, shall the parties use sarcastic, profane or abusive language. The Binder(s) be maintained, when full, at Mother's home in a safe place away from Sawyer. At Father's request, however, Mother shall temporarily surrender all or some of the Binders to Father for 24-hour time periods, if he wishes to photocopy them for any reason. Mother shall provide the PC with a copy of the Binder, or any part of the Binder, at the PC's request, at any time.
4. Neither parent may enroll Sawyer in extracurricular activities that infringes on the other's parenting time, unless expressly agreed in writing by that parent.

Each parent shall maintain clothing, toys, and other items reasonably necessary for Sawyer's care in their respective homes.

Neither party shall discuss parenting time, child support or custodial issues with the Sawyer, absent reasonable cause that it is necessary to do so to protect Sawyer's physical, emotional or moral welfare.

If either parent is unavailable to care for Sawyer overnight during their regularly scheduled access time, the non-custodial parent is entitled to care for Sawyer before another family member (including a step parent, fiancé or grandparent). The parent who will be absent overnight shall provide the other parent 24 hours notice so that he/she may choose to exercise this option which the Court will call the "right of first refusal." Notice of a parties' choice to exercise his/her

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right of first refusal must be exercised, if at all, within one of the other party giving notice that he/she is will be absent overnight.

Neither parent shall expose Sawyer to derogatory comments about the other parent or his/her relatives, friends or "significant others." The parents shall not argue in front of Sawyer or where he can overhear arguments.

Neither parent shall disparage the other parent's religious views and shall respect to other parent's right to expose Sawyer to their own religious views during their his/her parenting time.

The non-custodial parent shall have the right to contact Sawyer by telephone during the Sawyer's reasonable waking hours, no more than once per day, for 5 minutes. The exact time may be set by the parties, and the length of the calls may extended by the parties, if agreed in writing by parties.

In the event of an emergency, the non custodial parent has permission to seek care immediately but should contact the other parent as soon as reasonably practicable, which is presumed to be ***no more than 2 hours***. Neither parent should make health care appointments during the other parent's parenting time but shall inform the other parent of all appointments.

In the event, a parent wishes to remove Sawyer from Maricopa County during his/her parenting time or summer vacation, he/she shall provide the other parent with a written itinerary, one week in advance, which shall include: (1) the date and time of departure; (2) the mode of transportation; (3) the persons with whom Sawyer will travel; (4) the point of destination(s); (5) contact information at all points of destination; (6) the date of departure, the mode of transportation back, the persons with whom Sawyer will travel, and the estimated time of arrival; and (6) a phone call, e-mail or other direct communication upon arrival back to their residence.

5. Both parents entitled to all records pursuant to Ariz. Rev. Stat. Ann. § 25-403.06 and provisions, including but not limited to potential sanction, apply; *both parents* shall have equal access to documents and other information concerning Sawyer's education and physical, mental, moral and emotional health including medical, school, police, court and other records directly from the custodian of records or the other Parent.

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6. **Summer Vacation Schedule:** Both parents shall have 1 week of interrupted visitation time during each year. The vacation shall take place during the summer months, that is, June, July or August. The parties shall choose their time periods for their respective vacations and communicate those periods to one another no later than April 15th each year. If there is a conflict in vacation time that cannot be resolved, Mother's proposed vacation time shall prevail in odd-numbered years and Father's proposed vacation time shall prevail in even-numbered years. The failure to provide a timely proposed vacation schedule will result in the automatic forfeiture of that parent's vacation for that year. In no event, may a parent schedule their Vacation Time to conflict with other parent's Major Holiday. However, the parents may schedule their Vacation Time to append to their own Regular Parenting Time or their own Major Holiday time to extend the actual time of visitation during their Summer Vacation.
7. **Mother's Counseling.** Mother shall each undergo at least one separate counseling session with a person who has at least a Master's Level Degree and is licensed in Arizona to do counseling on anger-management issues. Mother is directed to advise the counselor that he or she is to assess whether anger management counseling would benefit Mother. Mother shall follow that counselor's reasonable recommendations as to counseling needed. The Assessment shall be completed later than December 31, 2010. The cost of the assessment and counseling, if recommended, shall be borne solely by Mother.
8. **High Conflict Resolution Class.** Both parties shall take this Court's high conflict resolution class no later than March 1, 2011 and file with the Clerk of the Court the certificate of completion. Each party shall bear their own cost of \$50.00

III. SAWYER'S NAME.

The Court has found that Mother inappropriately changed Sawyer's name twice. As a preliminary matter, both parents are enjoined from changing Sawyer's name without the expressed written permission of the other parent. That Mother has already changed his name without Father's permission is not just cause to act unilaterally now. Indeed, the parties must attempt to resolve the matter informally.

The Court observes that Arizona law directs the parties to use a "best interest" analysis-- using specific factors. *See e.g., Pizziconi v. Yarbrough*, 868 P.2d 1005 (Ariz. Ct. App. 1993); *Laks v. Laks*, 540 P.2d 1277 (Ariz. Ct. App. 1975). Those factors should guide the parties in their resolution of this issue, informally.

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IT IS ORDERED that the parties must use the Court's Conciliation Services to attempt to resolve their difference, if they cannot resolve it informally. As a condition precedent to filing a Petition for a name change, the filing party must allege compliance with this Order or otherwise must set forth good cause for failing to so.

IV. MAKE-UP TIME

The Court finds no meaningful reason to count "missed days" or attribute fault to award make-up time, other than the days given to Mother to permit her to have maternal grandmother visit. Those days will be chosen by the parties mutually and made up.

V. CHILD SUPPORT

The Court has calculated child support and filed a child support worksheet with this Order reflecting its findings.

IT IS ORDERED that Father shall pay to Mother child-support in the amount of \$67.72 per month effective March 1, 2010, by wage assignment, through the Support Payment Clearinghouse.

IT IS FURTHER ORDERED that the parties shall each be 50% responsible for un-reimbursed medical expenses. The party who incurs such expenses shall make written request for payment within 6 months of incurring that expense and shall provide the other party a copy of their receipt with that written request. The reimbursing party shall make payment within 30 days of a timely request for payment.

IT IS FURTHER ORDERED that Father shall be entitled to claim Sawyer as a tax exemption in odd-numbered tax years and Mother shall be entitled to claim Sawyer as a tax exemption in even-numbered tax years.

LET THE RECORD REFLECT that an electronic Order of Assignment is initiated by the above-name deputy clerk.

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IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

/S/ MICHAEL D. GORDON

MICHAEL D. GORDON
JUDGE OF THE SUPERIOR COURT

FILED: Exhibit Worksheet and Child Support Worksheet

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.